# In the Supreme Court of the United States.

OCTOBER TERM, 1920.

R. E. KENNINGTON ET AL., APPELLANTS,
v.
A. MITCHELL PALMER ET AL., APPELLEES.
No. 367.

*ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, JACKSON DIVISION, SOUTHERN DISTRICT OF MISSISSIPPI.*

## BRIEF FOR APPELLEES.

This is an appeal from a decree of the District Court declining to enjoin a United States district attorney from prosecuting the appellants for violations of section 4 of the Act of August 10, 1917 (40 Stat., c. 53, p. 276), known as the Food Control or Lever Act, as amended by section 2 of the Act of October 22, 1919 (41 Stat., 1st session, c. 80, p. 297).

### STATEMENT OF THE CASE.

The appellants, who are merchants dealing in wearing apparel, filed their bill seeking an injunction to restrain prosecutions against them on the charge that they were making unjust and unreasonable rates or charges in handling or dealing in necessaries, to wit, wearing apparel. The bill states, with much

detail, the manner in which appellants do business. Without now going into details, it is sufficient to say that the bill explains elaborately the things which appellants' claim must be taken into consideration in fixing just and reasonable prices for their wearing apparel. It is then alleged, in substance, that, while neither the President nor any one acting by his authority has fixed the price at which appellants' wearing apparel shall be sold, officials of the Department of Justice, acting through what are called fair-price committees, have adopted a schedule of prices and margins of profit as applicable to such goods, and appellants have been notified that sales of goods at prices in excess of this schedule will be regarded by the United States district attorney as unjust and unreasonable and will be prosecuted as violations of the Act of October 22, 1919. That Act itself is then assailed as unconstitutional, because (1) no state of war existed as a matter of fact between the United States and Germany and her allies at the time of the passage of the Act; (2) wearing apparel bore no relation to such state of war as may have existed on the 22d day of October, 1919, or at any time since so as to confer upon Congress authority to regulate the prices thereof; (3) section 2 of the Act of October 22, 1919, which makes it a criminal offense to make any unjust or unreasonable charge in handling or dealing in necessaries, does not define the offense thereby denounced as a crime, but leaves the definition thereof to the judgment and consciences of judges and juries in trials after the fact, and is therefore an *ex post facto*

law in conflict with Article I, section 9, subdivision 3, of the Constitution of the United States; (4) the Act is also unconstitutional because in conflict with and prohibited by the Sixth Amendment to the Constitution, in that no one accused of a violation of the Act in so far as it relates to wearing apparel or the rates charged or prices made or exacted in handling or dealing in the same is or can be informed of the nature or cause of the accusation against him, and no one at the time of the act which forms the basis of the charge can by any possibility determine whether he is or is not violating such statute; (5) the Act is unconstitutional because it excepts from its operation farmers and certain others. Some other objections were made to the Act, but, since they are not now presented in the brief filed, need not be noticed.

### RULING OF THE COURT BELOW.

The District Court, without an opinion, dismissed the bill, the decree reciting that the court was of opinion that the plaintiffs had a plain, adequate, and complete remedy at law, and that for this reason alone they were not entitled further to proceed in this cause.

### BRIEF.

## I.

**No injunction could properly issue unless the act under which appellants were about to be prosecuted was found to be unconstitutional.**

In the brief filed in this court the only ground upon which the right to an injunction is assailed is the

unconstitutionality of the acts of Congress involved. Plainly this is the only ground upon which such a right to enjoin criminal prosecutions could be predicated. It is unnecessary, therefore, to consider those portions of the bill which present merely controversies between the appellants and Federal authorities as to the proper meaning and construction of the act, and we may pass at once to the constitutional questions raised.

## II.

**The Government's contention as to these constitutional questions have been fully presented in briefs filed in cases No. 324, United States v. L. Cohen Grocery Company, and No. 357, Harry B. Tedrow, United States District Attorney for Colorado, v. A. T. Lewis & Son Dry Goods Company.**

All the constitutional questions now raised are involved in one or the other, or both, of the cases of *United States* v. *L. Cohen Grocery Company*, No. 324 on the docket of this court, and *Harry B. Tedrow, United States District Attorney for the District of Colorado*, v. *A. T. Lewis & Son Dry Goods Company*, No. 357 on the docket of this court, which have been set for hearing contemporaneously with this case. The Government's contentions have been fully presented in the briefs filed in those cases, and it is not deemed necessary to repeat here the arguments there advanced. Hence, only such reply to the arguments contained in appellants' brief will be made as may be deemed necessary to supplement what has been said in the other cases mentioned.

## III.

**The Lever Act, as amended, does not take private property within the meaning of the constitutional provision against taking such property without due compensation.**

It is contended that the effect of this Act is to take private property without making compensation therefor, and hence that it is void. This contention is based upon a misconception of the nature of the law. It does not purport to take and does not take the property of any one. It is merely the exertion of police powers as incident to the war powers of Congress. If it is a valid law at all, it is so because of the governmental power which authorizes "the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another." *Munn* v. *Illinois*, 94 U. S. 113, 124. It simply says that, under the stress of war conditions, no citizen shall so conduct himself or use his property, by extorting unreasonable charges for necessaries in which he deals or for his services in handling such necessaries, as to injure his Government or the public as a whole, upon whom the Government must depend for the successful prosecution of the war. The constitutional provision against taking property without compensation has no relation whatever to the lawful exercise of the police powers of Government. *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146; *Jacob Ruppert* v. *Caffey*, 251 U. S. 264. The sole inquiry, therefore, is whether the statutes in ques-

tion are the result of a lawful exertion of the police power.

## IV.

**When the Act of October 22, 1919, was passed, Congress was in full possession of its war powers.**

It is next insisted that, although Congress was authorized to exert its war powers in 1917, when the Lever Act was passed, the emergency calling forth those powers had passed before the passage of the Act of October 22, 1919, which, for the first time, included wearing apparel in the definition of necessaries and made the selling of necessaries at an unreasonable price a criminal offense. This question would seem to be completely foreclosed. The Act in question was passed six days before the National Prohibition Act. If, therefore, the war powers were available for the passage of the latter Act, they were undoubtedly available for the passage of the former. The specific objections now made to the Act of October 22, 1919, were made against the National Prohibition Act. This court, however, held that, on October 28, 1919, Congress was in the full possession of its war powers and was itself the judge of the extent to which it was necessary to exert them, and that hence the National Prohibition Act passed on that date was valid, and also that the earlier Prohibition Act of November 21, 1918, which, by its terms, was to end with the termination of the war and the completion of demobilization had not ceased to be effective. *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, 163;

*Jacob Ruppert* v. *Caffey*, 251 U. S. 264, 281–2. Exactly the same conditions with respect to war existed when the present Act was passed on October 22, 1919. At that time, as pointed out by Mr. Justice McReynolds in his dissenting opinion in the *Jacob Ruppert* case, demobilization of the armies was practically and substantially complete. No material changes in war conditions have occurred since.

The present Act, by its terms, is operative until peace shall have been ascertained and proclaimed by the President. It is, of course, conceded that this statute involves the exertion of police powers which would ordinarily belong to the States and not to the Federal Government. Their exertion in this case by Congress is justified alone upon the ground that such exertion is a necessary incident to the full exercise of the war powers of Congress. This being true, for war purposes, Congress may exert such powers to the full extent that any other Government could exert them. We have shown in the brief for the Government in the case of *United States* v. *L. Cohen Grocery Co.*, No. 324 on the docket of this court, that the things required by this Act are within the inherent functions of Government. The argument to that effect will not now be repeated. It is supported by the case of *Munn* v. *Illinois*, 94 U. S. 113, and the cases following and commenting on that case.

We call attention to the fact that counsel in their brief have quoted from the opinion of Mr. Justice Field in *Munn* v. *Illinois*, *supra*, and have inadvertently referred to him as speaking for the

court, when, in fact, his opinion was a dissenting opinion. It is worthy of comment, however, that the language quoted from the learned Justice in his dissenting opinion clearly defines the scope and effect of the opinion of the court as laying down a rule that fully supports legislation of the kind now under consideration.

V.

**The act of October 22, 1919, is not too vague and uncertain to form the basis of a criminal prosecution.**

This question has been fully discussed in the Government's brief in the case of *United States* v. *L. Cohen Grocery Co.*, No. 324, which will be heard contemporaneously with this case. It is not now necessary, therefore, to repeat that argument. It may be said that among the many cases cited in support of appellants' contention there are some which it is difficult to distinguish from this case. There are some which perhaps can not be distinguished. But in so far as any of these cases are not distinguishable from the present case, they are equally undistinguishable from the case of *Nash* v. *United States*, 229 U. S. 373, which it is respectfully submitted establishes the validity of the present law as against this particular objection.

## VI.

**The exclusion of farmers and certain others from the operation of the act of October 22, 1919, is not an arbitrary classification and does not render the Act void.**

The contention in this case that the Act is unconstitutional because the exclusion of farmers and others from its operation is an arbitrary classification is supported in the brief solely by the citation of *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540. The Government's argument in answer to this contention is fully presented in its brief in No. 357, *Harry B. Tedrow* v. *A. T. Lewis & Son Dry Goods Co.*, and need not now be repeated.

## VII.

**There is no contention that a mere failure to conform to prices fixed by a fair-price committee can be made the basis of a criminal prosecution.**

The Government does not contend, for a moment, that a criminal offense can be established by simply showing that a merchant has failed to conform to prices fixed by fair-price commissioners. The bill itself shows that no prices have been fixed by the President or in the exercise of any authority committed to him. The so-called fair-price committees were used by the Department of Justice for the purpose of gathering information and data upon which the prosecuting officers of the Department could base a judgment as to what prices were reasonable in preparing to enforce the law by prosecution. They

served the further purpose, by publishing results of their investigation, of giving notice to merchants at what prices they could sell without having to defend a criminal prosecution. In other words, such merchants were thus notified that the Department of Justice was prepared to endeavor to show in court that certain prices, if exacted, would be unreasonable and therefore criminal. But the Government would never have thought of charging in an indictment merely that the prices so approved by the fair-price committees or the district attorney had not been complied with. The charge would have been that the prices exacted were unjust and unreasonable and therefore a violation of the law itself.

### CONCLUSION.

It is respectfully submitted that the Act in question is not subject to any constitutional objections and that the decree denying the injunction and dismissing the bill was right and should be affirmed.

WILLIAM L. FRIERSON,
*Solicitor General.*

SEPTEMBER, 1920.

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